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Thyme Holdings, LLC d/b/a Westgate Gardens Care Center and Service Employees International Union Local 2015. Cases 32–CA–190480 and 32–CA–197298

August 16, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS
PEARCE AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed in Case 32–CA–190480 on December 27, 2016, and amended on April 20, 2017, and a charge filed in Case 32–CA–197298 on April 20, 2017, by Service Employees International Union, Local 2015 (the Union), the General Counsel issued the consolidated complaint (the complaint) on May 4, 2017, alleging that Thyme Holdings, LLC d/b/a Westgate Gardens Care Center (the Respondent) has violated Section 8(a)(5) and (1) of the Act by failing and refusing the Union’s request to recognize and bargain with it following the Union’s certification in Case 32–RC–183272. (Official notice is taken of the record in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On May 31, 2017, the General Counsel filed a Motion for Summary Judgment. On June 2, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the Union filed a Joinder in Motion for Summary Judgment.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union’s certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the certified unit consists of supervisory employees excluded from the coverage of the Act.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special cir-

cumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.¹

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a California limited liability company with an office and place of business in Visalia, California, where it has been engaged in the operation of a skilled nursing facility.

During the 12-month period ending on December 27, 2016, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$250,000, and purchased and received goods valued in excess of \$5000 directly from sources located outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a healthcare institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.²

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on November 4, 2016, the Union was certified on November 15,

¹ The Respondent’s request that the complaint be dismissed is therefore denied.

Chairman Miscimarra would have granted review in the underlying representation proceeding, finding that the request for review raised substantial issues warranting review of the Acting Regional Director’s finding that the Respondent’s Licensed Vocational Nurses (LVNs) are not statutory supervisors outside the coverage of the Act. While he remains of that view, Chairman Miscimarra agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

² In its answer to the complaint, the Respondent asserted that it lacked sufficient information, belief, or knowledge to admit or deny the allegation that the Union is a labor organization under Sec. 2(5), and therefore denied this allegation. However, in the underlying representation proceeding, the Respondent stipulated that the Union is a labor organization within the meaning of Sec. 2(5). Accordingly, we find that the Respondent’s denial does not raise any issue warranting a hearing. See, e.g., *All American Service & Supplies*, 340 NLRB 239, 239 fn. 2 (2003).

2016,³ as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time LVNs employed by the Employer at its Visalia, California facility; excluding all other employees, Minimum Data Set Department employees, Directors of Staff Development, professional employees, office clerical employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By oral requests on November 29, 2016, January 6, and April 10, 2017, and by written correspondence, including emails, letters, and bargaining proposals, dated January 5 and 6, and April 7, 2017, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since November 29, 2016, the Respondent has failed and refused to do so.⁴

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since November 29, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and

³ By unpublished Order dated March 31, 2017, the Board (then-Acting Chairman Miscimarra, dissenting in part) denied the Respondent's Request for Review of the Acting Regional Director's Decision and Direction of Election.

⁴ In its answer to the complaint, the Respondent admitted "only" that the Union has requested bargaining "at various times and by various means—some of which are described in Paragraph 6" of the complaint and that it has refused to bargain with the Union "at various times and by various means—some of which are described in Paragraph 7" of the complaint. The Respondent further stated that it denied the remaining allegations in those complaint paragraphs. However, the Respondent did not specifically deny any of the complaint allegations regarding the dates on which this conduct occurred. Therefore, we deem the complaint allegations regarding these dates to be admitted as true. NLRB Rules and Regulations, Sec. 102.20 ("any allegation in the complaint not specifically denied . . . shall be deemed to be admitted to be true and shall be so found by the Board").

desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).⁵

ORDER

The National Labor Relations Board orders that the Respondent, Thyme Holdings, LLC d/b/a Westgate Gardens Care Center, Visalia, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Service Employees International Union, Local 2015 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time LVNs employed by the Employer at its Visalia, California facility; excluding all other employees, Minimum Data Set Department employees, Directors of Staff Development, professional employees, office clerical employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Visalia, California, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on

⁵ In its Joinder in the General Counsel's motion, the Union requested several additional remedies related to the Notice to Employees. We deny these requests because the Union has not shown that the Board's traditional remedies are insufficient to remedy the Respondent's violations. See *Mercedes-Benz of San Diego*, 357 NLRB No. 114, slip op. at 3 fn. 6 (2011), enf'd. 576 Fed.Appx. 1 (mem) (D.C. Cir. 2014).

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judge's

forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 29, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 16, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Service Employees International Union, Local 2015 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All full-time and regular part-time LVNs employed by the Employer at its Visalia, California facility; excluding all other employees, Minimum Data Set Department employees, Directors of Staff Development, professional employees, office clerical employees, guards, and supervisors as defined in the Act.

THYME HOLDINGS, LLC D/B/A WESTGATE GARDENS CARE CENTER

The Board's decision can be found at <https://www.nlr.gov/case/32-CA-190480> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

